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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1099

GEORGE ANTHONY ROSSETTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A, 14-16) is reported at 315 F. 2d 86.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 1963 (Pet. App. B, 17). A petition for rehearing was denied on April 16, 1963. The petition for a writ of certiorari was filed on May 15, 1963.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it was error for the court to permit the government to call to the stand a witness to answer three questions which, at a hearing outside the presence of the jury, the judge had indicated were not subject to a claim of privilege.
2. Whether the evidence supports the verdict.
3. Whether a motion for a new trial was properly denied.
4. Whether the statute prohibiting smuggling of marihuana is unconstitutional as requiring a self-incriminatory admission of unlawful possession.

STATUTE INVOLVED

The Narcotic Drugs Import and Export Act, as amended, Sec. 2(h), 70 Stat. 570 (21 U.S.C. 176a):

> Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned

not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

* * * * *

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of California of aiding and abetting one Kasamis to smuggle 35 pounds of marihuana into the United States, in violation of 21 U.S.C. 176a and was sentenced to seven years' imprisonment. Kasamis had been separately tried and convicted before the trial of petitioner and his co-defendant Crea (who was acquitted).

1. The government's evidence showed that on February 22, 1962, Kasamis was stopped as he entered the United States at San Ysidro, California, in a green and black Oldsmobile. Approximately 35 pounds of marihuana were found in the car (2 R. 50-66, 120-121).

Petitioner, who lived in Mojave, California, had left the Oldsmobile for sale at a lot in Lancaster, California, on December 31, 1961, with a document asserting title in his own name, but the car was not sold from the lot. During January, 1962, petitioner had been seen on the lot at least once with Crea, who also lived in Mojave (2 R. 89-95; 3 R. 159, 163, 245). Petitioner, Kasamis and Crea had been seen together at a cafe in Rosamond, California, in late January or February, 1962 (3 R. 218-220).

On February 20, 1962, at about 11:30 a.m. petitioner drove to the house where Kasamis lived in Lancaster, California, and, a few minutes later, drove off with Kasamis in a car other than the Oldsmobile (2 R. 111-115, 119). At about one o'clock that afternoon, Kasamis and Crea were seen in the Oldsmobile driving south on the Kern County-Los Angeles line. When stopped, Crea produced a registration certificate for the car in his own name (2 R. 96-107, 123). Kasamis testified that he received the keys to the Oldsmobile on February 22, 1962 (2 R. 84).[1] Sometime between midnight and 6 a.m. on February 22, 1962, petitioner registered at the Holiday Inn in San Ysidro, California, two blocks from the port of entry from Mexico. He gave his correct name on the registration card, and recited that there were two other persons with him, but gave a Lancaster address (3 R. 148-150, 216, 248).

Kasamis, at the time of leaving his mother's house, was without funds of his own, and when apprehended

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[1] The circumstances concerning claim of privilege by Kasamis are set forth *infra*, pp. 5-6.

reentering the United States on February 22, had less than a dollar (2 R. 114, 121). The current price for 35 pounds of marihuana across the border from San Ysidro was from $350 to $720 (3 R. 197-198; and see 3 R. 269). Petitioner and Crea had previously received about $500 as the outcome of some litigation (3 R. 180, 187).

On the afternoon of February 22, after Kasamis's arrest, petitioner and Crea and their families left their homes at Mojave, California, without notice to the manager or to the principal of the Mojave elementary school which petitioner's daughter attended. The daughter was playing with a friend in Mojave after school,[2] up to 4:00 or 4:30 of that afternoon (2 R. 124, 126-127; 3 R. 152-154, 158-161, 165-166, 221-224). When petitioner was arrested on March 13, 1962, in Brooklyn, New York, he told the government agent that he had left California on February 19, 1962 (3 R. 177-179).

2. Before Kasamis was called, defense counsel said that he had been informed that Kasamis would claim the privilege against self-incrimination and would not testify for the government or defense (2 R. 47-48). Counsel for Kasamis was called in and further colloquies were held outside the presence of the jury. Kasamis, who had given a statement on February 26, had been convicted but had not yet been sentenced. His attorney informed the court that the privilege against self-incrimination would be claimed as to all

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[2] The school was in session on February 22, Washington's Birthday (3 R. 154).

testimony, in view of possible conspiracy or tax charges and because of the possible effect of any testimony on the sentence yet to be imposed (2 R. 72-75). Government counsel stated that Kasamis would be asked only three questions, which he had already answered at his own trial and the judge indicated that the privilege would not apply (2 R. 74-76).

Before the jury, government counsel asked Kasamis whether he entered the United States in a 1952 green and black Oldsmobile on February 22, 1962 (2 R. 79). After a claim of self-incrimination and discussion at the bench of the witness' testimony at his trial, the witness was directed to answer. He testified "Yes, I did" (2 R. 82-83). The witness further testified that he opened the trunk of the car for the customs inspector. To the question as to when he received the keys to the automobile he replied, "I don't remember exactly" (2 R. 83). Upon being shown the prior transcript, he replied, "February 22nd, I believe; Thursday" (2 R. 84). Petitioner's counsel chose not to cross-examine Kasamis (2 R. 87-88).

3. Petitioner moved for a new trial, on the basis, *inter alia*, of a written statement, dated June 14, 1962, (after the trial of the case) by the teacher of petitioner's daughter. It read as follows (1 R. 53):

> Mary Lou Rossetti came to see me at school, Friday, February 16, 1962, to ask me about checking Deborah, her daughter, out of school. She stated at that time that she was not sure just when they would be leaving. I gave her Deborah's report card, and told her the school records would be sent on when requested by the

> new school where she would be enrolled. She could not request a transfer as yet, for Deborah would still be in school for a few more days.

Petitioner also listed five persons who were "aware" that petitioner "planned to leave the Mohave area" (1 R. 54). He presented a written statement of the part owner of petitioner's residence, that it was "known" to him that petitioner "had planned to leave sometime the last of February or first of March," for New York or Arizona (1 R. 59).

In opposition (1 R. 56-58; 64-75) the government presented, *inter alia*, a further written statement by the school teacher, that she had informed petitioner's wife, at the February 16 interview, that "the normal procedure was to advise the front office of the Mojave Elementary School of the time of moving" and also to advise the officials of the new school of the attendance at Mojave so that they would send for the daughter's records. The teacher was not advised, on February 22, that the daughter would no longer be in school (1 R. 73-74).

The government also presented the portion of transcript of the trial of Kasamis in which a government agent testified to admissions by Kasamis on February 26, 1962. Kasamis had said that two men, known to him as George and Patty, told him that they had just obtained $500 and asked him to drive some marihuana into the United States which they would sell in New York. On February 20, 1962, "George" had picked him up at his home, and driven him to the Astic Gardens at Mojave from where Kasamis drove on in the Oldsmobile with "Patty" ("George" fol-

lowing in another car). The marihuana was not available in Tia Juana on the night of February 20, so all three spent the evening of February 21 at the San Ysidro Holiday Inn motel. They returned to Tia Juana on the morning of February 22, and Kasamis drove the Oldsmobile back to San Ysidro (1 R. 70-72).

At the hearing on the motion, petitioner was permitted to call his wife to the stand. She testified only to her absence from California at the time of the trial, and not to any matters in explanation of the departure on February 22, 1962 (4 R. 347-348).

ARGUMENT

1. The question of the right to call Kasamis to the stand was carefully explored outside the presence of the jury with Kasamis represented by his own counsel. The government stated that it intended to confine itself to three questions which it deemed proper in view of the testimony which Kasamis had given at his own trial. The court upheld the government's right to ask these questions. Before the jury, the witness, with his counsel present, after again raising a claim of privilege which was overruled, answered the three questions. Under these circumstances, no rights of petitioner were violated. *Namet* v. *United States* No. 134, this Term, decided May 13, 1963. The inferences which the government asked the jury to draw were from the testimony, not from silence.

Petitioner argues that, in view of the assertion by the witness that he would claim the privilege,

petitioner could not by cross-examination or otherwise show that Kasamis received the keys to the car from someone other than petitioner (Pet. 10). But petitioner could have, as the government did, ask the court to rule on the propriety of specific questions, relating to the subject matter of direct examination—the keys to the car. The court might well have directed the witness to answer and the witness might well have answered. Petitioner did not choose to test out the issue. There is, accordingly, no foundation for the claim that petitioner was curtailed in his right of cross-examination. As in *Namet*, there was here neither a conscious attempt to build the government's case out of inference arising from use of the testimonial privilege nor any refusal to answer in a form not subject to cross-examination.

2. The sufficiency of the evidence to go to the jury presents no question warranting review by this Court. However the standard may be phrased, a case is properly presented to the jury if the evidence is such that a reasonable man drawing reasonable inferences from the evidence could find guilt beyond a reasonable doubt. See *Holland* v. *United States*, 348 U.S. 121. Here the evidence disclosed that the actual smuggler was without the funds to buy the marihuana found in the car. Petitioner had access to the funds and the car. Petitioner was seen meeting with the smuggler shortly before the trip to Mexico; he was at the port of entry on the day the smuggling attempt was made. After the smuggling attempt proved unsuccessful, petitioner hastily de-

parted from his home with his family. From this combination of circumstances the jury could conclude that guilt was established beyond a reasonable doubt.

3. Similarly, the denial of the motion for a new trial presents no issue for review. At most the motion for a new trial showed only that petitioner and his wife had, before February 22, contemplated leaving California at some undetermined future time. It does not explain or negate the fact that removal on February 22 was precipitous.

4. Petitioner contends that the statute prohibiting smuggling of marihuana into the United States is unconstitutional in that it requires a self-incriminatory admission of possession of the marihuana. The short answer is that the customs declaration at the border is prospective, relating to what is sought to be brought into the United States, rather than an admission of a past offense already completed. No one is compelled to bring in marihuana. See *United States* v. *Kahriger*, 345 U.S. 22, 32-33; *Lewis* v. *United States*, 348 U.S. 419, 422-423.

CONCLUSION

For the above reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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